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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA

v.

PETE HARRIS AND ELIZABETH HARRIS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT

OPINION BELOW

The letter opinion of the district court has not been reported. A copy thereof is annexed hereto as an Appendix, *infra*, pp. 5-7.

JURISDICTION

The order of the district court dismissing the information was filed November 28, 1956. Appendix, *infra* p. 7. Notice of appeal to this Court was filed December 21, 1956. The jurisdiction of this Court to review on direct appeal an order dismissing an information, based on a construction of the statute on which the in-

formation is founded, is conferred by 18 U.S.C. 3731. *United States* v. *Borden Co.*, 308 U.S. 188; *United States* v. *Ludenia Howard*, No. 52, this Term.

STATUTE INVOLVED

The Internal Revenue Code of 1954, 26 U.S.C., Supp. III, provides in pertinent part:

§ 4461. * * *

There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

(1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);

(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and

(3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *

§ 4462. * * *

(a) In general.

As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—

(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing

or operating the machine to receive cash, premiums, merchandise, or tokens.

(b) Exclusion.

The term "coin-operated amusement or gaming device" does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) 1-cent vending machine.

For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

QUESTION PRESENTED

Whether a pin-ball machine, the operation of which involves the application of an element of chance as the result of which the player may become entitled either to free plays or money, is the type of gaming device which is subject to the tax imposed by 26 U.S.C., Supp. III, 4461 (2) upon "so-called 'slot' machines" as defined in 26 U.S.C., Supp. III, 4462 (a).

STATEMENT

An information in two counts charged defendants with having willfully failed to pay the tax on coin-operated gaming devices maintained on their premises which, by application of the element of chance, might entitle the player to receive cash. A stipulation in the record indicates that the machines are of the pin-ball

type involved in the case of *United States* v. *Korpan*, 237 F. 2d 676, pending on writ of certiorari granted January 21, 1957, No. 596, this Term. The district court dismissed the information on the authority of the *Korpan* decision, which had held that no pinball machine is within the definition of a "so-called 'slot' machine" in 26 U.S.C. 4462(a)(2) even though the machine is operated by a coin, and, by the application of the element of chance, entitles the player to cash or premiums.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal is the same as that presented in the petition for a writ of certiorari in *United States* v. *Korpan*, No. 596, this Term, and on direct appeal from the decision of the District Court for Minnesota in *United States* v. *Hunt* and *United States* v. *Ollhoff*, Nos. 674 and 675, this Term. For the reasons stated in the petition for a writ of certiorari in No. 596 and the jurisdictional statement in Nos. 674 and 675, the question is one which should be decided by this Court.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JANUARY 1957.

APPENDIX

UNITED STATES DISTRICT COURT
EIGHTH CIRCUIT
WESTERN DISTRICT OF ARKANSAS

Chambers of John E. Miller, Judge.

FILED Nov. 28, 1956, Truss Russell, Clerk

By Marian Heinrichs, Deputy Clerk

Fort Smith, Ark.
November 28, 1956.

Honorable Charles W. Atkinson, United States Attorney, Fort Smith, Arkansas.

Mr. Glenn F. Walther, Attorney at Law, Boyle Building, Little Rock, Arkansas.

IN RE: UNITED STATES OF AMERICA

v.

PETE AND ELIZABETH HARRIS

CRIMINAL ACTION NO. 601

HOT SPRINGS DIVISION

GENTLEMEN:

I have carefully considered the brief filed by the defendants in this case in support of their motion to dismiss the information, along with the brief submitted by the Government in opposition to the motion to dismiss.

At the time Mr. Atkinson furnished me the brief for the Government he also supplied me with a copy of the stipulation that was executed on November 12, 1956, together with a photostatic copy of the opinion of the

United States Court of Appeals for the Seventh Circuit in the case of United States of America v. Walter Korpan. Also, Mr. Atkinson furnished me a typewritten copy of the memorandum opinion of Judge Elmer D. Davies, U. S. District Judge for the Middle District of Tennessee, in the case of United States of America v. One Bally Dude Ranch Coin-Operated Pin-Ball Machine.

The question presented by the memorandum to dismiss is a most difficult one. Section 4461 of Title 26, U.S.C., imposes a special tax to be paid by "every person who maintains for use, or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device" at the following rates: "(1) $10 a year in the case of a device defined in paragraph (1) of Section 4462(a); (2) $250 a year, in the case of a device defined in paragraph (2) of Section 4462(a) * * *".

The stipulation discloses that the device is substantially [*sic*] if not identical with the device that was considered by the court in the Korpan case, and the defendants appear to have paid a tax of $10 per year. Thus, the question is whether they were subject to a tax of $250 a year instead of $10 per year. The government contends that the amount of the tax on the device is $250 a year, while the defendants contend that the proper amount of the tax is $10 per year.

The court in the Korpan case construed Section 4462 (a)(1) and (2), and held that the pin ball device came within the definition of Section 4462(a)(1) rather than 4462(a)(2).

This Court does not consider it is absolutely bound by the Korpan decision, but in the absence of any higher or more binding authority on this court, I am of the opinion that the Court should follow the Korpan case. Since I am of that opinion, the motion to dismiss should be

sustained, and an order is being entered today sustaining the action to dismiss and dismissing the information.

Sincerely yours,

JNO. E. MILLER.

cc: Clerk of the Court.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Criminal Action No. 601

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PETE HARRIS AND ELIZABETH HARRIS, DEFENDANTS

ORDER

On this November 28, 1956, having considered defendants' action to dismiss the information herein, together with defendants' brief in support of said motion and the brief of the government in opposition thereto, and the stipulation of the parties heretofore filed, the Court has written its opinion relative thereto in the form of a letter to counsel, and in accordance therewith,

IT IS ORDERED AND ADJUDGED that the said motion to dismiss the information be and is sustained, and that the information herein be and is dismissed.

JNO E. MILLER,
United States District Judge.

FILED Nov. 28, 1956, Truss Russell, Clerk. By Marian Heinrichs, Deputy Clerk.

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PER

CURIAM

No. 727. UNITED STATES *v.* HARRIS ET AL. Appeal from the United States District Court for the Western District of Arkansas. *Per Curiam:* The judgment is reversed. *United States* v. *Korpan*, 354 U. S. 271. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Robert A. Sprecher* for appellees.